

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

No. 77-6175

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6175

NORMAN BIRNBAUM, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

On Appeal from the United States District
Court for the Eastern District of New York

BRIEF OF PLAINTIFFS-APPELLEES AVERY AND MACMILLEN

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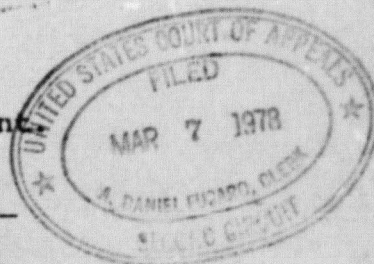


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Statement of the Case

The government's Statement of the Case fails to mention the critical fact that the CIA mail-opening program, which was carried on for twenty years, was conducted without a warrant ever having been applied for or issued.

The government also tries to exonerate the parties responsible for planning and conducting the warrantless mail-opening program, even though it was clearly in violation of the Fourth

Amendment and specific criminal prohibitions.^{1/} Though the point is not critical to plaintiffs' theory of the case, or to the defense, the fact is that several high-ranking CIA officials acknowledged that they knew the program was illegal while it was in progress (Senate Report, pp. 604-607),^{2/} and the Church Committee concluded that, "The record is clear. . . that the perceived illegality of mail opening was a primary reason for closely guarding knowledge of the programs from ranking officials in both the executive and legislative branches of the government" (Senate Report, p. 562).

The other deficiency in the government's Statement of the Case is its abbreviated and inadequate description of the injuries which the plaintiffs suffered as a result of learning that their mail had been opened.

Mr. Avery considered his mail to his son to be "very private" (Tr. 34).^{3/} On learning that his mail was opened, Mr. Avery said (Tr. 38):

"Well, I was appalled that the Government would do such a thing. Never--I never thought it would happen in this country where it was a democratic country. It's supposed to be a free country. And I was outraged that they

^{1/} 18 U.S.C. §§1701, 1702, 1703, 1708 and 1709 all prohibit one or another aspect of mail tampering.

^{2/} The Report's full title is set out in note 3 of Appellant's Brief.

^{3/} "Tr." refers to the transcript of the record of trial.

had actually opened my mail, my private mail to my son. And particularly in view of the fact that we had taken precautions to send mail, to keep it out of the hands of the Soviet authorities, then to discover that the United States Government was committing the same offense. I found it inexcusable, suffered a great deal of disappointment over this because I--I--shattered my faith in the United States Government."

When asked if his attitude about the function of government had changed on learning that his mail was opened, Mr. Avery said (Tr. 39):

"Well, yes. My attitude changed. I thought if they could open my mail, perhaps other things can happen. I mean tap my phone or interfere with other constitutional rights that I have. And I became very apprehensive about this and wondered if this was all that was going to happen or if more things might happen to me. It shook my faith in the sincerity of the Government to protect my constitutional rights which I have always assumed was being done and I had never worried about it before."

When asked in cross-examination if any of his apprehensions had diminished in the two years since he learned his mail had been opened, Mr. Avery replied (Tr. 45-46):

"Well--I think I could--you know, I'm living with it. It's not constantly on my mind. But I think a great deal of it is not so much--not so much apprehension but the disappointment that this could happen to an American in America. That these things could happen. It's a really disappointing thing. You felt like you've been betrayed by your Government when this happens to you."

Ms. MacMillen testified that her letter which was opened by the CIA was "a purely personal letter" (Tr. 51). In fact, the letter was so personal, it is in evidence as a sealed exhibit,

seen neither by judge nor jury. A summary of the letter was introduced for examination by the court and jurors (Tr. 52).

Ms. MacMillen testified that although she wanted to write again to the Soviet citizen to whom her opened letter was addressed, she had not done so (Tr. 60):

"A Because I can only suspect that because the CIA did it once they will do it again and it is distasteful to me that the thought anyone other than my friend and myself seen the communication.

Therefore, I don't feel that I can do it again.

"Q Will you write to your friend in the future? The Government lawyer in this case has assured you that the CIA has stopped opening the mail, and I told you as far as I know the CIA is not opening the mail any more.

Will you write to your friend in the future now you know the mails are not opened?

"A I am not sure I will because I am not sure I believe that. I want to believe that. I want to believe it won't happen again. But my trust has definitely been shattered.

I certainly believed beforehand that that never would happen and it did happen. Therefore, I just can't trust what I am told."

On being asked what her initial reaction was upon learning the CIA had opened her mail, she said (Tr. 61-62):

"A I remember it was in the morning, I believe around 11 o'clock, getting on towards noon. I was between interviews at the time and went downstairs to get my mail and there was a package, a rather large envelope.

I opened it and my initial reaction was absolute outrage. I was livid. I jumped out of the chair and ran into a friend and ranted and raved.

It seemed so wrong that I would be the subject of a government investigation. It invaded my privacy. I knew I was innocent. There was certainly nothing about my past that would have merited their surveillance.

I tried to rationalize it at that moment sitting there in my office, but I couldn't rationalize it. I was furious."

"Q Had your sense of anger diminished in the eighteen months since then?

"A Not a bit. It fluctuates sometimes, but just the thought of going through this experience or bringing it up angers me.

"Q Apart from the anger that you felt learning that your private mail had been opened, did you feel any emotion?

"A Yes, I definitely felt very embarrassed--humiliated in fact--because of the fact the nature of my letter was only--was one of the most personal letters I have ever written....

Ms. MacMillen testified that, in addition to her other reactions, she was "afraid" (Tr. 65):

"I was afraid for myself because all of a sudden the presence of the Government which I felt in its full force scared me. It scared me not in terms of my physical well being but a general fear as to what might happen to me other than what already had.

A fear that other letters I might write to my friend would also be opened.

So I think I was afraid of the consequences--nothing that I could put my finger on right then--but in the future my Government, with this knowledge, would affect me with not being able to work for the Government in a nonpolitical sense which is a dream I have, work for a cultural exchange program.

I must say that more important than the fears I felt for myself were the fears I felt for my friend.

Ms. MacMillen's emotional distress was so severe, that she suffered physical symptoms which required medical attention (Tr. 68-69).^{4/}

ARGUMENT

The essence of the government's principal defense in this case is that officials of the United States may violate precise constitutional and statutory prohibitions in order to serve the interests of "national security." It is remarkable that this Administration should have the insolence to seriously put that claim forward less than four years after Richard Nixon was driven from the White House and after other high officials have served prison terms for acting essentially upon the same claim to limitless power. But the defense is a total failure from a public policy, a precedential and an analytical point of view, and the Court must reject it unambiguously.

^{4/} The United States suggests, somewhat disengenuously, that Ms. MacMillen's emotional distress could not have been too severe, since she wrote to her Russian friend on two subsequent occasions. Brief for Appellant, p. 11. However, the United States omits mentioning that one subsequent communication was a birthday card and the other was a letter delivered by hand by a visitor to Russia to avoid the possibility of interception (Tr. 59). Since learning of the interception, Ms. MacMillen has not entrusted any communication of a personal nature to her friend in the United States mails.

I

THE DISCRETIONARY FUNCTION EXEMPTION
DOES NOT APPLY IN THIS CASE.

1. The authorities are virtually unanimous that illegal and unconstitutional acts are outside the discretionary function exemption.

It is perfectly clear that the CIA's mail-opening program was unconstitutional and illegal, for the Supreme Court has consistently held for 100 years that the Fourth Amendment requires that the search of first-class mail must be supported by a warrant. Ex Parte Jackson, 96 U.S. 727 (1878); United States v. Van Leeuwen, 397 U.S. 249 (1970). The Supreme Court reaffirmed that principle just last Term in United States v. Ramsey, 431 U.S. 606 (1977). Nonetheless the United States puts forward as its main argument here that the CIA mail-opening project, illegal and unconstitutional though it may be, is outside the scope of the Federal Tort Claims Act [FTCA] because it was conducted as a "discretionary function" of government and thus is an activity exempt from the FTCA by §2680(a).

The United States relies mainly upon Dalehite v. United States, 346 U.S. 15 (1953), for its interpretation of the discretionary function exemption, and joins issue by asserting that the fact that, "The decisions to establish the mail opening program were contrary to the law or contrary to the Constitution cannot serve to distinguish Dalehite" (Br. 19). That assertion is wrong. The illegality of the mail-opening program simply

destroys the applicability of Dalehite because the activity in that case was legal in every respect. The question in Dalehite was only whether the damage caused by an aspect of such lawful activity should result in liability of the United States where it was alleged that the United States was negligent to some degree. The main debate in Dalehite was to sort out among the whole spectrum of lawful government activities, those which were to be exempt as "discretionary" and those which were not. In supplying examples of such discretionary activities, the Supreme Court referred to such activities as deepening the Mississippi River, changing the course of the Missouri River, building dams, and running an experimental plant station. 346 U.S. at 36, n. 32. Those examples are all of lawful activities; not one of them is even arguably unlawful. Thus, the Supreme Court was clear that, as far as its understanding of the FTCA was concerned, discretionary activity had to be lawful activity.

Only a few years after deciding Dalehite, the Supreme Court squarely held in Hatahley v. United States, 351 U.S. 173 (1956), that intentionally unlawful acts by the United States will not be exempt as discretionary functions. There, Interior Department range managers "vigorously prosecuted a campaign to round up and destroy" horses belonging to Navejo Indians, proceeding under the Utah Abandoned Horse statute. The Supreme Court found that the statute "was applied discriminatorily" against the Indians (at 176). Federal regulations

required that, prior to invocation of applicable state statutes, federal range officers were required to serve notice upon alleged violators. Having failed to do so, the Court held that the Utah statute had not been properly invoked and consequently found the United States liable under the Tort Claims Act on the ground that, "These acts were wrongful trespasses not involving discretion on the parts of the agents, and they do give rise to a claim compensable under the Federal Tort Claims Act" (at 181).

The legislative history of the FTCA is explicit in stating that the discretionary function exemption applies only to lawful activity. The government's brief (Br. 20), in fact, quotes the language out of Dalehite which refers to the testimony of an Assistant Attorney General in the House in which he said that the purpose of the exemption was to avoid

"... any possibility that the act may be construed to authorize damage suits against the Government growing out of a legally authorized activity, [merely because] the same conduct by a private individual would be tortious." (emphasis added) 5/

5/ The government's brief quotes that passage and its continuation to make the point that the FTCA was not intended as a vehicle to test the constitutionality or legality of legislation or regulations, and to press the conclusion that the suit at bar must necessarily fail because its purpose is to challenge the constitutionality and legality of the mail opening program. That argument is spurious, for all that the plaintiffs seek in this case, as in any case under the FTCA, is damages for the tort liability of the United States under the law of the State of New York, where the tortious acts occurred. See 28 U.S.C. §1346(b).

In explanation of the discretionary function exemption, the House Report makes clear that Congress had only lawful activities in mind in adopting the exemption:

This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown and the only ground for suit is the contention that the same conduct by a private individual could be tortious, or that the statute or regulation authorizing the project was invalid.
H. Rep. No. 2245, 77th Cong., 2d Sess., H. Rep. No. 1287, 79th Cong., 1st Sess., pp. 506.

This Court held less than three years ago in Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (1975), that the discretionary function exemption of the FTCA does not apply where the tortious acts are illegal or unconstitutional. Myers and Myers, Inc. involved a claim against the Postal Service in connection with its refusal to renew six contracts with the plaintiff transportation company. Plaintiff's claim was based upon a determination by the General Counsel of the Postal Service that the procedures followed in the refusal to renew the contracts violated the Regulations of the Postal Service and denied the plaintiff the "fundamental fairness" to which it was entitled. 527 F.2d at 1255. The district court dismissed plaintiff's claim on the ground that the decision whether to renew the contracts was a "discretionary function" under 28 U.S.C. §2680(a).

Reversing the district court, this Court held that the action taken by the Postal Service disregarded the necessity of extending the required procedural safeguards (527 F.2d at 1259); that the "wrongful act" of denying those procedural safeguards may well have been a tort in "the law of the place where the act or omission occurred" (527 F.2d at 1260); and as to the government's claim that the "discretionary function" exception of the Tort Claims Act applied, held:

The Government renews its argument that the "discretionary function" exception applies. But here the appellants' argument is that the Postal Service has acted in contravention of its own regulations, if not unconstitutionally, in denying appellants a hearing prior to debarment from government contracting. It is, of course, a tautology that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170-71, 2 L.Ed. 60 (1803); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Century Arms, Inc. v. Kennedy, 323 F.Supp. 1002, 1005 (D. Vt.), aff'd, 449 F.2d 1306 (2d Cir. 1971), cert. denied, 405 U.S. 1065 (1972). This distinguishes cases such as Scanwell Laboratories v. Thomas, supra and United States v. Morrell, supra, which hold that even though discretion is abused, its exercise cannot give rise to a federal tort claim. See 28 U.S.C. §2680(a). For here the appellants' claim is that the Postal Service lacked discretion to act in disregard of its own applicable regulations and of the Constitution. See Larson v. Domestic & Foreign Commerce Corp., supra; Hatahley v. United States, 351 U.S. 173, 181 (1956) (emphasis added).

That holding recognizes that even when government employees act in contravention of their agency's own regulations, to

say nothing of the Constitution or statutory law, those acts cannot be within the discretionary function exemption.

The court below rejected the government's discretionary exemption claim on the ground that "there is no discretion under our system to conceive, plan and execute an illegal program," relying on Hathahley v. United States, supra, and Myers & Myers, Inc. v. United States Postal Service, supra.

Judge Clarie, in the District of Connecticut, in M. Avery v. United States, 434 F.Supp. 937 (1977), a companion case to the case at bar, also rejected the government's claim that the mail-opening program was excluded from the FTCA by the discretionary function exemption. Pointing out that there is a significant difference between abuse of discretion and lack of discretion, finding that Dalehite did not bear directly on the question at bar, and relying upon Hatahley and Myers & Myers, Judge Clairie concluded that the mail-opening program "was in violation of its subject's rights and in excess of its progenitor's discretion, and therefore was not excepted from the FTCA by §2680(a)."

Judge King, in the District of Hawaii, in Cruikshank v. United States, 431 F.Supp. 1355 (1977), a second companion case to the one at bar, also rejected the government's claim that the CIA mail-opening was exempt from the FTCA as a discretionary function, relying on Hatahley. He said:

. . . if this country has learned nothing else in this past decade, it has learned that no man, nor any man acting on behalf of our government,

is above the law. The Government should not have the "discretion" to commit illegal acts whenever it pleases. In this area, there should be no policy option. Nevertheless, if the Government's argument were accepted in this case, that would be the effect of this Court's decision. Although Congress has certainly given the CIA a broad mandate to do whatever is necessary to gather intelligence around the world, this Court refuses to accept the proposition that it can do anything. 431 F.Supp. at 1359.

See also Simons v. United States, 413 F.2d 531, 534 (5th Cir. 1969) (the United States has no "authority or discretion to trespass on plaintiff's land not under its control"); DeBonis v. United States, 103 F.Supp. 123, 125 (W.D. Pa. 1952) (an illegal seizure is not within the discretionary exemption because government agents have the "obligation and duty to comply with the mandate of the 4th Amendment"); Downs v. United States, 522 F.2d 990 (6th Cir. 1975) (acts of FBI agent in causing death of hostage during airplane hijacking not within discretionary act exception, since objective standard for evaluating legality of actions is provided by applicable regulation).^{6/}

^{6/} The only authority that the government is able to cite to support its argument that unconstitutional acts can be within the discretionary function exemption, is Kiiskila v. United States, 466 F.2d 626 (C.A. 7, 1972). To the extent that this Court believes that Kiiskila rests on serious analysis of the issue (though note that it contains no reference to Hatahley v. United States), its conclusion should be rejected as erroneous.

The statement of the fundamental principle that government officials in our Nation do not have the power--or discretion--to violate the law and Constitution is as recent as Watergate and as venerable as Marbury v. Madison, 5 U.S. (1 cranch) 137 (1803), 2 L.Ed. 60. In examining the limits of the judicial power, Chief Justice Marshall recognized that where the Constitution vests discretion in the executive branch of government, the propriety of the exercise of that discretion could not be adjudicated in a legal action (2 L.Ed. at 71):

It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive branch, can never be made in this court.

Yet when it is alleged that an executive officer has committed an illegal act, then the mere fact of executive office will not bar the court from intervening and compelling obedience to the law.

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceedings, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

* * *

Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual than if the same services were to be performed by a person not the head of a department. 2 L.Ed. at 71.

Thus, since Marbury v. Madison, it has been recognized that the Constitution and the laws set the boundaries of executive discretion and there can never be discretion to violate them.

Judicial recognition of the fundamental principle that government officials have no discretion to violate the law and Constitution appears in other contexts.

in United States v. Nixon, 418 U.S. 683 (1974), the President contended that as the chief executive officer he had final authority to determine evidence required for prosecution of a criminal case, and challenged the Special Prosecutor's demand that he produce such evidence. The President argued that the executive branch had sole discretion to decide how to prosecute a case and, as head of the executive branch, he possessed that power. The Court rejected the argument. It

noted that, pursuant to the Constitution, the Congress had vested in the Attorney General the power to conduct the criminal litigation of the United States, that under those statutes, the Attorney General had delegated the authority to represent the United States in the particular case involved to the Special Prosecutor, and that had promulgated specific regulations authorizing Special Prosecutor to contest the President's invocation of Executive Privilege. The Court then held (418 U.S. at 696):

It is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force, the executive branch is bound by it, and indeed the United States as a sovereign composed of the three branches is bound to respect and to enforce it.

In United States v. United States District Court, 407 U.S. 297 (1972), a case conceptually similar to the one at bar, the Supreme Court rejected a claim by the Executive branch that it had the power to intercept telephone conversations without a warrant in order to protect the national security. The Court's decision was based on the compulsions of the Fourth Amendment. Mr. Justice Douglas, concurring, noted that, "When the Executive attempts to excuse these [dragnet surveillance techniques] as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court's long commitment to the preservation of the Bill of Rights from the

corrosive environment of precisely such expedients," 407 U.S. at 331.

In United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 418 U.S. 683 (1977), the Court of Appeals for the District of Columbia, rejected the argument that high government officials have the discretion to conduct burglaries in the name of national security.

In Citizens to Preserve Overton v. Volpe, 401 U.S. 402 (1971), the Supreme Court, considered the scope of Section 701 of the Administrative Procedure Act which precludes judicial review of agency action which "is committed to agency discretion by law." Describing the exception as "very narrow," the Court held that it applied only "in those rare instance where statutes are drawn in such broad terms that in a given case there is no law to apply" (at 410). Insofar as the "discretion" in the A.P.A. is not unlike the discretion in the Tort Claims Act, both of which are meant to protect government officials from being hobbled in performing their duties, the limits on that discretion are conceptually equivalent. Thus, in the case at bar, there is law to apply--the criminal statutes and the Fourth Amendment--which limit discretion and forbid its exercise in violation of law. See, infra, at 21-23.

In Oestereich v. Selective Service System, 393 U.S. 233 (1968), in face of a statutory prohibition against pre-induction judicial review of selective service classifications, the

Supreme Court allowed such review because the local board's classification violated the Selective Service Act (393 U.S. at 238):

We deal with conduct of a local board that is basically lawless In such instances, as in the present one, there is no exercise of discretion by a board in evaluating evidence and in determining whether a claimed exemption is deserved. The case we decide today involves a clear departure by the board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the act with unnecessary harshness.

See also Murray v. Vaughn, 300 F. Supp. 688, 697 (D. R.I. 1969).

The leading treatise on the FTCA explains the "discretionary function" exception to mean that:

. . . Congress wanted to cut the private-liability analogy short, at the point where, if a tort suit were permitted, the executive and legislative branches would be subjected to unwarranted judicial supervision. Congress, in other words, was unwilling to invoke the private-liability analogy to such an extent that the government would be liable in tort for mistakes in judgment of governmental officials acting in administrative or regulatory or quasi-legislative capacities in areas in which the courts have traditionally refrained from substituting their judgment for that of the officials empowered by law to make the determination which may result in claimant's injury. Jayson, Handling Federal Tort Claims, §245, p. 12-4.

In addition to the fact that HTLINGUAL was no mere "mistake in judgment" but a grossly illegal activity carried on secretly

for twenty years, it cannot be said that there is either "unwarranted judicial supervision" involved in litigation of this case, or that its subject matter is one in which the courts "have traditionally refrained from substituting their judgment" for that of officials of the executive branch. To the contrary, the courts have traditionally enforced the various prohibitions against molestation of the mails, as they have traditionally enforced the Fourth Amendment prohibition against illegal search and seizure of the mails. Ex Parte Jackson, supra; United States v. Van Leeuwen, supra; Ramsey v. United States, supra; Procunier v. Martinez, 416 U.S. 396, 408-09 (1974).

The Supreme Court has said time and again that the courts may not read exemptions into the Tort Claims Act beyond those specifically provided by Congress, Rayonier v. United States, 352 U.S. 315, 320 (1957), and that the courts are not to "add to the rigors" of the Act "by refinement of construction where consent has been announced." United States v. Aetna Surety Co., 338 U.S. 366, 383 (1949). Those controlling principles require the Court to reject the government's interpretation of the discretionary function exemption.

2. The discretionary function exemption does not apply where a Tort Claims action would not unduly hamper government officials in choosing between alternative and lawful courses of action, and where the judiciary does not lack manageable standards to evaluate the legality of the conduct at issue.

One purpose of the discretionary function exemption is to prevent over-deterrence of legitimate governmental activity. Where a high government official faces a choice between two lawful courses of action, Congress did not wish to inhibit his freedom of choice by holding out the threat of subsequent sanction if the wrong course were chosen. See Barr v. Mateo, 360 U.S. 564 (1959); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Developments in the Law: Remedies Against the United States, 70 Harv. L. Rev. 727, 729 (1957). Where, however, no fear of over-deterrence of legitimate activity exists, Congress did not intend to exempt the official conduct in question from judicial review in a subsequent damage action. Cf. Scheuer v. Rhodes, 416 U.S. 232 (1964); Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), on remand, 456 F.2d 1339 (2d Cir. 1972). Where a governmental official - no matter how exalted - faces a choice between two courses of conduct, one of which is lawful and the other of which violates the laws or Constitution of the United States, the law is concerned not with maximizing freedom of choice but rather with deterring the official from electing the unconstitutional course of conduct. Society has no interest in encouraging its officials to violate the basic political

compact by which it is governed. Thus, were individual defendants to seek an absolute immunity from suit arising out of the same illegal mail-opening project as in this case, based upon the policy of exempting officials from the threat of personal liability in order to assure vigorous performance of official duties, they would certainly fail. E.g., Scheuer v. Rhodes, *supra*; see also, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc) (denying immunity to director of state prison system); Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971) on appeal from remand, 486 F.2d 76 (2d Cir.), *cert. denied*, 419 U.S. 894 (1974) (denying immunity to director of state mental hospital); Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972). Since individual defendants would clearly be denied absolute immunity in these circumstances, it is an a fortiori proposition that no discretionary function immunity can be recognized here when, at most, any deterrence is indirectly caused by a threat of governmental, as opposed to personal, liability. See generally, Kennedy and Lynch, Some Problems of a Sovereign Without Immunity, 36 So. Cal. L. Rev. 161, 178 (1963).

A second purpose of the discretionary function exception is to insulate from judicial scrutiny those acts of government officials which cannot be evaluated by traditional judicial standards. Cf. Baker v. Carr, 369 U.S. 186 (1962). Where no standard exists against which to measure the legality of a

given act, the courts may appropriately be barred from second-guessing an official whose decision has turned out to be wrong. Thus, in Dalehite v. United States, supra, the legality of the decision to use a munitions plant to manufacture fertilizer for export to post-war Europe was deemed to require consideration of factors beyond the scope of judicial competence. The level of risk to be tolerated in such an activity was itself a function of the foreign policy needs of the nation. Since no objective "risk" standard existed against which the official conduct in Dalehite could be measured, the Supreme Court declined to second-guess the risk decisions which had been made.

On the other hand, whenever a clearly defined standard of legality exists against which official action may be measured, courts have uniformly rejected attempts to forbid judicial review under the rubric of the discretionary function doctrine. Thus, in Hatahley v. United States, supra, an objective standard for the evaluation of the legality of official action was provided by a departmental regulation which had been violated. Similarly, in Myers & Myers, Inc. v. United States Postal Service, supra, although no objective standard existed against which the Post Office's decision to decline to review a "star route" contract existed, this Court noted that the procedural regularity of the decision to disqualify the plaintiff from bidding on new contracts was subject to evaluation under two

sets of judicially manageable standards - the due process clause of the Fifth Amendment, e.g., Gonzales v. Freeman, 334 F.2d 570, 579 (D.C. Cir. 1964); and postal regulations guarantying notice and a hearing prior to debarment. Accordingly, this Court rejected a discretionary function challenge to its jurisdiction. See also, Downs v. United States, supra.

No serious question exists concerning the existence of a manageable judicial standard against which to test the legality of the mail-opening scheme at issue here. There can be no disagreement that the Fourth Amendment provides a frame of reference against which to test the legality of the program. Ex Parte Jackson, supra; United States v. Van Leeuwen, supra. The existence of such a frame of reference in and of itself renders the discretionary function exception inapplicable. Moreover, the government has grudgingly conceded that when Fourth Amendment standards are applied to the mail openings, the program is illegal. Thus, not only does a manageable judicial standard exist, the government concedes that the manageable standard was violated. Under such circumstances, there is no serious argument that the judiciary lacks functional capacity to pass on the legality of the mail-opening program. Accordingly, the discretionary act exception has no application to this appeal.^{7/}

^{7/} Under the government's reading of the discretionary function exemption, the Director of the Central Intelligence Agency would be free to embark on a "policy" of assassination of persons deemed to be threats to national security without subjecting the United States to liability for wrongful death. Since manageable judicial standards exist to test the legality of both murder and warrantless mail opening and since society has no interest in encouraging either, the discretionary function exemption does not bar this action.

II

PLAINTIFF'S CLAIM IS NOT BARRED
BY THE "POSTAL MATTER" EXCEPTION
OF 28 U.S.C. §2680(b)

Section 2680(b) provides that the Federal Tort Claims Act does not apply to claims "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The government, relying upon the usage in Henry VIII's day, asserts that the exception applies here because "the claims in this case clearly arise out of the "miscarriage of letters." The language of the statute and its legislative history make clear that it was not intended and does not operate to bar this claim. Actually, the government's argument is frivolous.

In the Senate hearings on the FTCA, the Department of Justice explained that the reason for the proposed "postal matter" exception was that

[e]very person who sends a piece of postal matter can protect himself by registering it, as provided by the postal laws and regulations. It would be intolerable, of course, if in any case of loss or delay, the Government could be sued for damages. Consequently, this provision was inserted.

Hearings Before a Subcommittee of the Senate Judiciary Committee, 76th Cong., 2d Sess., p. 38 (1940). The exception of claims "for which adequate remedies are already available" appears consistently in the Congressional Reports of the FTCA. S. Rep. No. 1400, 79th Cong., 2d Sess., p. 33 (1946);

S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7 (1942); H.R. Rep. No. 2245, 77th Cong., 2d Sess., p. 10 (1942). See Jayson, Handling Federal Tort Claims, §255, pp. 13-2 - 13-3, §236, p. 11-3, n. 8, §6.11, p. 1-70 (1962, Supp. 1975). There is, of course, no alternative means of recovery for persons like plaintiffs whose mail was illegally opened, read and copied by the CIA, and the 2680(b) exception therefore cannot apply.

The Court below and the courts in M. Avery v. United States, supra, and Cruikshank v. United States, supra, all dismissed this argument by the government as simply wrong. The court below held that, "None of the available sources for the interpretation of this subsection support such a restrictive reading." 436 F.Supp. at 974. Judge King in Cruikshank held that the government's interpretation of §2680(b) "ignores the plain language of the statute." 431 F.Supp. at 1359. And Judge Clarie held in M. Avery that, "The plaintiff's letters were neither lost, miscarried, nor negligently transmitted; they were intentionally taken out of the mail, to become the subject of HTLINGUAL, with all that that entailed." 434 F. Supp. at 945.

The application of this Court's decision in Marine Insurance Co. v. United States, 378 F.2d 812, cert. denied, 389 U.S. 953 (1967), as urged by the government, is a bit obscure. In that case, the plaintiff had mailed a package of jewels without insuring them. The package was removed from the mails by Customs officials to be treated with a fluorescent powder to assist in

a smuggling investigation. The package of jewels was then returned to the mails and subsequently lost for unrelated reasons. The plaintiff sued for damages for loss of the jewels under the Tort Claims Act, arguing that mail once taken out of the regular flow of mails, no matter the purpose, lost its character as "postal matter" and, if subsequently lost, damages could be recovered under the Tort Claims Act. Though this Court quite correctly rejected that implausible argument, the government seeks to exploit the decision in the context of this case by trying to persuade the court that if postal matter is taken from the mails, no matter the reason, and then returned to the regular flow, no matter the consequences, then the postal matter exemption precludes suit under the Federal Tort Claims Act. That argument is as specious as the plaintiff's in Marine Insurance. It has no conceivable application in this case, where the claim for damages arises not out of an insurable loss, but out of a loss which resulted from flagrantly illegal acts of government officials. It is as if the government were to argue that the "postal matter" exception bars FTCA suits for damages caused by negligent operation of a post office truck which is involved in "transmission of letters."

III

THE COURT BELOW CORRECTLY HELD THAT A
CAUSE OF ACTION FOR DAMAGES EXISTS UNDER
THE LAW OF NEW YORK FOR WARRANTLESS MAIL OPENING.

In order to establish Tort Claims liability, plaintiffs must demonstrate that relief under New York law would be available in an action against a hypothetical non-sovereign defendant. As the District Court elaboratedly demonstrated, New York would provide relief under at least three theories against a non-sovereign defendant who surreptitiously opened, copie and circulated the contents of sealed first-class mail. Plaintiffs Avery and MacMillen respectfully refer the Court to the brief of Plaintiff Birnbaum (pp. 3-21) for exposition of the applicable tort law of New York. We incorporate that section of the brief into our own.

We add one point. Were a non-sovereign defendant sued for mail opening in a diversity action in federal court in Brooklyn, the District Judge would look to New York substantive law under Erie Railroad v. Tompkins, 304 U.S. 64 (1938). The District Judge would not, however, be obliged to act as a static reporter of New York law, but would be obliged to act as a dyamic interpreter of state law by anticipating trends. Corbin, The Laws of The Several States, 50 Yale L.J. 762, 775-76 (1941); Essex Universal Corp. v. Yates, 305 F.2d 572, 580-82 (2d Cir. 1962); Cooper v. American Airliens, Inc., 149 F.2d 355, 359 (2d Cir. 1945). The role of a District Judge in applying state law in a Tort Claims context is identical with the role of an Erie judge. The District Court, acting as a dynamic interpreter of New York law,

found that New York, confronted with surreptitious mail opening, would recognize a cause of action for invasion of privacy. This Court has ventured a similar prediction in Galella v. Onassis, 378 F.2d 986 (2d Cir. 1973). Moreover, the District Court's finding that New York would treat surreptitious mail opening as a violation of common law copyright and, if performed under color of official authority, as a violation of both New York State and the Federal Constitutions, is not open to serious question. It simply is not reasonable to suggest that New York would fail to provide relief to a plaintiff whose mail had been surreptitiously opened, copied and disseminated.^{8/}

IV

THE DISTRICT COURT'S DECISION
TO AWARD \$1,000 IN COMPENSATORY
DAMAGES WAS WELL WITHIN ITS DISCRETION.

The District Court awarded appellees one thousand dollars to compensate them for the loss of their Fourth Amendment rights and for the mental distress caused by the unlawful interception, copying and dissemination of their personal letters. In an

^{8/} Indeed, to the extent New York courts exercise general jurisdiction, they may not decline to entertain a cause of action sounding in the Fourth and Fourteenth Amendments against state officials engaged in a similar mail opening scheme. E.g., Testa v. Katt, 330 US 386 (1947).

effort to assist him in assessing damages, Judge Weinstein empanelled an advisory jury. After hearing the testimony, the members of the advisory jury recommended compensatory awards of from \$10,000 to \$2,500.^{9/} Judge Weinstein questioned each advisory juror in open court about the basis for their recommendation and, after consideration, decreased the lowest recommended figure by more than one-half. Despite the Judge's extremely conservative approach to the valuation issue, the government argues that the destruction of appellee's Fourth Amendment rights and the infliction of embarrassment, anger, disappointment, fear and humiliation upon them as a consequence of the interception, copying and dissemination of their private letters, did not justify a compensatory award of even \$1,000. Whether one views the award as compensation for the destruction of Fourth Amendment rights or as compensation for the emotional distress caused by the government's unlawful actions, a compensatory award of \$1,000 is well within the discretion of the District Court.

1. Compensation for Mental Distress Caused by Unlawful Activity

It is hardly a novel proposition that a plaintiff may recover compensation for emotional distress caused by a defend-

^{9/} Three members of the advisory jury recommended a \$10,000 award; one member recommended \$2,500; and eight jurors recommended \$5,000 (Slip Op. 52).

ant's unlawful acts. E.g., Battalla v. State of New York, 10 NY 2d 237, 219 NYS 2d 34 (1961); Wolfe v. Sibley, Lindsay, 36 NY 2d 505, 369 NYS 2d 637 (1975); Johnson v. State of New York, 37 NY 2d 378, 372 NYS 2d 638 (1975). See Goodrich, Emotional Disturbance as Legal Damages, 20 Mich. L. Rev. 497 (1922); Magruder, Mental and Emotional Disturbance in Torts, 49 Harv. L. Rev. 1033 (1936). In the instant case, the agents of the government unlawfully opened letters in which plaintiffs expressed extremely personal sentiments to close friends and relatives. Agents of the government read the letters, copied them and sent them to CIA headquarters and to the FBI, where yet others read plaintiffs' private thoughts. Not surprisingly, plaintiffs suffered embarrassment and humiliation at the prospect that their personal life was the subject of scrutiny by government agents. In addition, they suffered anger, fear, and outrage at the invasion of their privacy. Finally, they suffered disappointment and a loss of faith in government. While such intangible emotional distress is difficult to quantify precisely, American courts have consistently awarded substantial compensatory damages for such injuries. Thus, in Parker v. Shonefeld, No. C. 75-1267 (N.D. Cal. December 16, 1975), a jury awarded \$10,000 as compensation to a black plaintiff for emotional distress consisting of anger and humiliation caused by a violation of the Fair Housing Act. In Harper v. Thomas Reap Realty, P. H. Equal Oppt'y Housing Reporter, parag. 19.7 (N.D. Ohio 1976), a similar compensatory

award of \$10,000 for emotional distress flowing from racial discrimination was granted. In Allen v. Gifford, 368 F.Supp. 317, 322 (E.D. Va. 1973), the Court awarded \$3,500 for emotional distress flowing from a violation of the Fair Housing Act. See also, Hughes v. Dyer, 378 F.Supp. 1305, 1310-12 (W.D. Mo. 1973) (\$1,500 for emotional distress caused by violation of the Fair Housing Act); Stevens v. Dobbs, Inc., 373 F. Supp. 618, 622-23 (E.D. N.C. 1974) (same); Seaton v. Sky Realty, 491 F.2d 634, 637-38 (7th Cir. 1974) (upholding award of \$500 for emotional distress). In Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200, 1205 (E.D. Va. 1973), the court awarded compensatory damages of \$5,500 for mental distress caused by a failure to admit blacks to a private school. See also, Landman v. Royster, 354 F.Supp. 1302 (E.D. Va. 1973) (\$9,000 for psychological distress from improper prison practices); and McNeil v. P-N & S, Inc., 372 F.Supp. 658, 659 (N.D. Ga. 1973) (\$2,500 for mental distress caused by racial discrimination in rental of housing). Thus, in recognizing that the undeniable emotional distress inflicted upon appellees by the government's unlawful actions justified an award of \$1,000 in compensatory damages, the District Court may well have erred on the side of undervaluing the injury. In light of the greater awards under the Fair Housing Act, the government's attempt to characterize the modest award as excessive is untenable. Indeed, when one compares the federal awards for emotional distress with representative state awards for

similar emotional injuries, the generosity of the District Court toward the government is manifest. E.g., National Food Stores, Inc. v. Utley, 303 F.2d 284 (8th Cir. 1962) (\$10,000 for mental anguish caused by false imprisonment); Whitcomb v. Hearts, 329 Mass. 193, 107 NE 2d 295 (1952) (\$65,000 for emotional distress caused by defamation); Mohn v. Tringley, 191 Cal. 470, 217 P. 733 (1923) (\$75,000 for emotional distress caused by alienation of affections); Current v. Wolf, 244 Iowa 683, 57 NW2d 915 (1953) (\$4,000 for mental anguish caused by employer's threats); Windeler v. Scheers Jewelers, 8 Cal.App. 3d 844, 88 Cal. Rptr. 39 (1970) (\$4,000 for mental distress caused by failure to return rings having sentimental value). Most recently, in Jarchow v. Transamerica Title Insurance Co., 48 Cal. App. 3d., 122 Cal. Rptr. 470 (1975), a court awarded \$200,000 to plaintiffs for emotional distress caused by the wrongful actions of their insurance company. See also, Rogers v. Exxon Research and Engineering Company, 404 F. Supp. 324 (D. N.J. 1975) (\$200,000 award for emotional distress caused by age discrimination).

Moreover, under New York law, it is clear that breach of a duty may create substantial liability for emotional distress suffered by a plaintiff as a consequence of defendant's wrongful acts. E.g., Battala v. State of New York, supra; Wolfe v. Sibley, Lindsay, 36 N.Y. 2d 505, 369 N.Y.S. 2d 637 (1975); Johnson v. State of New York, 37 NY 2d 378, 372 NYS 2d 638 (1975). In Johnson, plaintiff was awarded five thousand nine

hundred (\$5,900) in compensatory damages for the emotional distress she suffered when a state hospital inaccurately informed her that her mother had died.^{10/} Although the emotional distress caused by an incorrect notification of a parent's death may well be more severe than the emotional distress caused by a gross invasion of privacy, Judge Weinstein's decision to award damages totalling only 1/6 the award in Johnson was clearly reasonable, and, indeed, extremely favorable to the government.

2. Compensation for the Destruction of Fourth Amendment Rights

Since Ashby v. White, 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1703), and Entick v. Carrington, 2 Wils. 275, 95 Eng. Rep. 807 (K. B. 1765), Anglo-American courts have awarded substantial compensatory damages for the destruction of basic political rights at the hands of the state. Just as property rights may not be destroyed by the State without just compensation, so personal rights may not be "condemned" without the payment of substantial compensatory relief. Thus, as early as 1900, American courts recognized causes of action for substantial

^{10/} The total award in Johnson was \$7,500. However, approximately \$1,600 was attributable to out-of-pocket funeral expenses.

damages for the deprivation of constitutional rights. E.g., Wiley v. Sinkler, 179 U.S. 58 (1900); Swafford v. Templeton, 185 U.S. 487 (1902). See also, Lane v. Wilson, 307 U.S. 258 (1939); Nixon v. Herndon, 273 U.S. 536 (1927). As Judge Sanborn noted in his landmark decision in Wayne v. Venable, 260 F.64 (8th Cir. 1919), upholding an award of \$2,500 for depriving a plaintiff of the right to vote:

In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property or other valuable things....
Wayne v. Venable, 260 F.64 (8th Cir. 1919).

Among the numerous modern cases authorizing an award of substantial damages for the intrinsic value of a constitutional right are Hughes v. Dyer, 378 F. Supp. 1305 (W.D. Mo. 1974); Bell v. Gayle, 384 F.Supp. 1022 (N.D. Tex. 1974); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (en banc); and Dellum v. Powell, F.Supp. (D.D.C. 1975), vacated, 566 F.2d 167 (D.C. Cir. 1977). See also Piphus v. Board of Education, 545 F.2d 30 (7th Cir. 1976), cert. granted, _____ U.S. _____ (1977).

Few rights have been bought with more blood and anguish than the right to shield one's private thoughts from the state. See generally, Levy, Origins of the Fifth Amendment (1968). To suggest, as does the government, that the systematic violation of that right by the Central Intelligence Agency gives rise to no compensable injury is to reduce a priceless right

to a worthless shadow. Our system of government is different from totalitarian systems because we view our political rights as valuable entities not merely as empty admonitions. To ascribe a monetary value to the right to be secure in one's private papers is difficult. However, in seeking to fashion retrospective judicial relief the translation of abstractions into cash equivalents is among the only processes we have. While none of us would sell our birthright of freedom for \$1,000, none of us would accept the government's position that our birthright is worthless. The good faith effort of the advisory jury and the District Court to ascribe a monetary value to Fourth Amendment rights achieved a reasonable compromise which, if anything, undervalued the rights in question.^{11/}

^{11/} The government's view of the role of compensatory damages is seriously flawed. The government argues that deterrence has no role whatever in a theory of compensatory relief. However, while the primary role of compensatory damages is, of course, to compensate the victim, orthodox analysis recognizes that a significant role of a compensatory damage system is the deterrence of wrongful action. E.g., Calabresi Views and Overviews, 1967 U. of Ill. Law Forum 600. Thus, in ascribing a substantial monetary value to Fourth Amendment rights, the court not only compensates a victim for the loss of a valuable political right, but also imposes a deterrent against future violations. Such a compensatory based deterrent has nothing to do with punitive damages which are not designed to compensate a victim for loss.

Finally, while the Justice Department argues here that the award of \$1,000 in damages is excessive, the Attorney General of the United States, in testimony before the House only a few weeks ago concerning proposed amendments to the Tort Claims Act, supported a provision for "a minimum of one thousand dollars in liquidated damages for Constitutional torts." (Statement of Griffin B. Bell before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, concerning H.R. 9219, February 23, 1978, p. 4).

V

SOVEREIGN IMMUNITY DOES NOT SHIELD THE
GOVERNMENT FROM THE CONSEQUENCES OF
SYSTEMATIC UNCONSTITUTIONAL ACTIVITY.

Substantial uncertainty surrounds the history of sovereign immunity and its current role in American law.^{12/} Traditional historical analysis traces the rise of sovereign immunity to the structure of the English feudal system.

The lord of each manor held court for his subjects, but was himself never subject to the jurisdiction of his own court. A lord was subject only to the court of a noble higher than he in the feudal hierarchy. The King being at the pinnacle of the entire feudal structure, was by the nature of the system subject to no court at all; hence the King's immunity to suit.

Developments in the Law: Remedies Against the United States, 70 Harv. L. Rev. 727, 729 (1957). See also, I Pollock & Maitland, The History of English Law 518 (2d ed. 1898).

Recent studies suggest that even in feudal England the King remained broadly suable pursuant to a petition of right. Jaffe, Suits Against Governments and Officers: Sovereign

^{12/} Plaintiffs are confident that full relief is available under the Tort Claims Act. The material discussed in this section is relevant, first, to demonstrate the fundamental unsoundness of the government's sovereign immunity position, and, second, as an alternative basis for liability.

Immunity, 77 Harv. L. Rev. 1 (1963).^{13/} In any event, English courts neatly sidestepped the doctrine by entertaining damage actions against agents of the King who had exceeded their lawful authority and were, therefore, no longer entitled to be treated as the King's men. E.g., Ashby v. White, 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1703) (damage action for denial of right to vote); Entick v. Harrington, 2 Wils. 275, 95 Eng. Rep. 807 (K.B. 1765) (damage action for unlawful search for "seditious papers"). Thus, the practical consequences of sovereign immunity under British law were relatively narrow.

The initial importation of sovereign immunity into American law was bound up with issues of federalism. When the Supreme Court in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), ruled that Article III of the Constitution impliedly abrogated sovereign immunity and made possible diversity actions in Federal courts against the States, the principle of sovereign immunity was adopted in the Eleventh Amendment to block the prospect of Federal judicial control over state finances.^{14/} It was not until the establishment of general

^{13/} the Modern studies have suggested that/maxim "the King can do no wrong" referred not to his insulation from suit, but to his obligation to permit a suit when necessary to achieve justice. Ehrlich, No. XII, Proceedings Against the Crown (1216-1377) at 74, in 6 Oxford Studies in Social and Legal History (Vinogradoff ed. 1921).

^{14/} The federalism converse of the Eleventh Amendment was the Supreme Court's decision in Tarble's Case, 13 Wall. 337 (1870), forbidding state courts from interfering with Federal officials.

federal question jurisdiction in 1875 that the stage was set for actions in federal court against the federal government free from the federalism concerns underlying Chisholm and the Eleventh Amendment. Unfortunately, however, by 1875, sovereign immunity, fueled by the federalism concerns of Chisholm, the Eleventh Amendment and Tarble's Case, was firmly established in American law as a verbal formula without ever having been subjected to serious scrutiny. Hart & Wechsler, The Federal Courts and the Federal System, 1341 (2nd ed. 1972). See also, United States v. Lee, 106 U.S. 196, 207 (1882).

Whatever its historical origins, moreover, no coherent justification for the survival of sovereign immunity in a modern democratic state has been suggested. Unable to posit a principled justification for the doctrine's continued existence, state after state has abolished or dramatically restricted its scope. E.g., Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 359 P.2d 457 (1961). Willis v. Dep't of Conservation, 55 N.J. 534, 269 A2d 34 (1970); Smith v. State, 93 Idaho 795, 473 P2d 937 (1970); Ayala v. Philadelphia Board of Public Education, 453 Pa. 584, 305 A2d 877 (1973). See also, American Law Institute Restatement 2d, Torts at 23, 24 (Comment A) (Tent. Draft No. 19) (1973). Not surprisingly, therefore, 20th century American courts, paralleling their 18th century English counterparts, have successfully evolved a device for sidestepping sovereign immunity in many cases by reasoning that actions in excess of constitutional authority are not the

actions of the sovereign, but rather are the actions of "erring" individuals acting ultra vires. Compare, Ex Parte Young, 209 U.S. 123 (1908), and Bivens v. Six Unknown Agents, supra, with Ashby v. White, supra and Entick v. Carrington, supra. See also, Scheuer v. Rhodes, supra. Thus, it is now clear that sovereign immunity will not defeat a damage claim against an "erring" government official who has acted in violation of the constitution. E.g., United States v. Lee, supra; Land v. Dollar, 330 U.S. 731 (1947); Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682, 705 (1949); Bivens v. Six Unknown supra; Scheuer v. Rhodes, supra. Where the "erring" federal official acted in accordance with the directives of unknown superiors, it seems unjust to erect a legal fiction which leaves the individual official subject to liability in a Bivens action, while the government as such shields itself behind a claim of sovereign immunity.

Plaintiffs therefore urge this Court to reject the government's attempt to raise even a question of sovereign immunity, since the government's twin concessions: (1) that the mail opening was unconstitutional; and (2) that the individual officials who carried out the mail openings were authorized to do so, precludes the assertion of a sovereign immunity defense. Marbury v. Madison, supra, reminds us that the sovereign is entitled to be regarded as sovereign only insofar as it respects the limitations of the Constitution.

CONCLUSION

For all the reasons stated above, the decision below should be affirmed.

Respectfully submitted,

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Plaintiffs' attorneys acknowledge the assistance of Mr. Harvey Feintuch, second year student at Hofstra University Law School, in the preparation of this brief.

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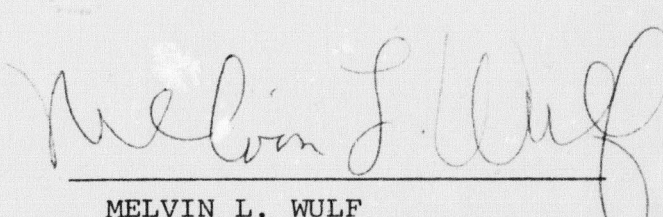
By 3/7/78
Mail

CERTIFICATE OF SERVICE

I, MELVIN L. WULF, hereby certify that service on the foregoing BRIEF OF PLAINTIFFS-APPELLEES AVERY AND MACMILLEN, was made this 3rd day of March, 1978, by mailing two copies thereof, first-class postage prepaid, to each of the following:

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